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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

The decision by the U.S. Court of Appeals for the Fifth Circuit raises important issues of constitutional law that should be addressed by this Court. In particular, *amici* are concerned that the Fifth Circuit's ruling, if allowed to stand, will serve to increase racial polarization and resentment in this country, needlessly perpetuating a destructive focus

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amici curiae* state that all parties have been notified of the filing of this brief, letters reflecting blanket consent have been filed with the Clerk, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

on "racial" issues and prolonging the misconception that race is a valid or legitimate concept. *Amici* argue that, ultimately, the only mention of race in the law should be its prohibition. Any divergence from this principle must be extraordinarily narrow, and for remedial purposes only.

The Fifth Circuit's decision to again uphold the University of Texas at Austin's ("UT" or the "University") race-conscious admissions policy is at odds with this Court's decision in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). *Amici* are concerned about the corrosive effect that affirming race-conscious government activity has on American society and the rule of law. Among the harms caused by the Fifth Circuit's decision upholding UT's policy are: the further enshrinement of the intellectually impoverished concept of race into law; the perpetuation of a culture of racial and ethnic politics in American public life; and the increase of racial intolerance in American society.

For these and other reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Human race and ethnicity are inherently ambiguous social constructs that have no validity in science. Invoking race and ethnicity to promote diversity relies on racial and ethnic stereotyping of individuals' viewpoints, backgrounds, and experiences.

Government policies such as the policy enacted by the University, which seeks to classify applicants by crude, inherently ambiguous, and arbitrary racial and ethnic categories to promote diversity can never be narrowly tailored to further a compelling government interest. Attempts to categorize individuals by racial and ethnic groups necessarily lead to absurd results.

Accordingly, the Fifth Circuit's attempt to find a narrowly tailored governmental racial program in UT's admission system necessarily must rely on artful abstractions in order to evade this Court's precedent. The lower court's decision does not satisfy strict scrutiny and should be reversed.

ARGUMENT

This case concerns the use of the concepts of race and ethnicity to discriminate among individuals seeking acceptance to college, which now returns to the Supreme Court after two visits to the Fifth Circuit. Part of the reason this case is so unresolvable is because the concept of "race" defies precise legal definition. The concept of "racial groups" came about as a crude way to categorize populations before later science showed the concept of "race" was hollow. Because of this, attempts to use the concept of "race" for legal purposes in modern times must both appear to reference biology while simultaneously disavowing it. This balancing act makes the use of race unjustifiable – and certainly unable to satisfy constitutional strict scrutiny – without the heavy

application of fuzzy thinking the Fifth Circuit employs.

A. Putting People in Racial Categories is a Crude and Arbitrary Practice That can Never be Narrowly Tailored

Our concept of human "races" originated prior to 1700 as European folk knowledge, gradually evolving into the pseudo-scientific racial theories of the 18th century:

> Rather than developing as a scientific concept, the current notion of "race" in the United States grew out of a European folk taxonomy or classification system sometime after Columbus sailed to the Americas... It was in this intellectual climate that the perceived purity and immutability of races originated.... For example, in the 18th century, Carolus Linneaus, the father of taxonomy and a European, described American Indians as not only possessing reddish skin, but also as choleric... Africans were described as having black skin, flat noses and being phlegmatic, relaxed, indolent....[2]

As the American Anthropological Association ("AAA") explains, to this day racial categories do not

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[2] American Anthropological Association, "Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting" (Sept. 1997), available at http://www.aaanet.org/gvt/ombdraft.htm.

bear scrutiny from the standpoint of the biological sciences.[3]

Because racial and ethnic categories are unscientific, inherently ambiguous, and arbitrary social constructs, their use in college admissions can never be "narrowly tailored" for purposes of strict scrutiny. As the AAA has explained, racial categories are generally too crude to convey accurate and useful information about individuals and groups.[4] Rather, a primary effect of routine reliance on crude racial categories is to perpetuate misinformation and irrational beliefs about others:

> "Race" thus evolved as a worldview, a body of prejudgments that distorts our ideas about human differences and group behavior. Racial beliefs constitute myths about the diversity in the human species and about the abilities and behavior of people homogenized into "racial" categories.[5]

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[3] *Id.* ("Genetic data show that, no matter how racial groups are defined, two people from the same racial group are about as different from each other as two people from any two different racial groups.")

[4] American Anthropological Association, "Statement on 'Race,'" (May 17, 1998) available at http://www.aaanet.org/stmts/racepp.htm (Americans "have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups.").

[5] *Id.*

The AAA has even recommended that the government phase-out its use of racial categories in order to achieve the goal of eventually eliminating racial discrimination.[6]

The Court's own history highlights the inherent offensiveness of government differentiations on the basis of "race." In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld Homer Plessy's conviction for violating Louisiana's Separate Car Act, which required separation of train passengers by race. Mr. Plessy acknowledged that one of his great grandparents was from Africa, making him 1/8th "Black" and 7/8ths "White." *Plessy*, 163 U.S. at 541. In addressing Mr. Plessy's "blood line," the Court observed:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, others that it depends upon the preponderance of blood, and still others that the predominance of white blood must only be in the proportion of three fourths.

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[6] American Anthropological Association, "Response to OMB Directive 15," (Sept. 1997) available at http://www.aaanet.org/gvt/ombdraft.htm. ("[T]he effective elimination of discrimination will require an end to such categorization, and a transition toward social and cultural categories that will prove more scientifically useful and personally resonant for the public than are categories of 'race.'").

Plessy, 163 U.S. at 552. Even the *Plessy* Court recognized the arbitrariness of racial classifications, finding that "it may undoubtedly become a question of importance whether, under the laws of Louisiana," Mr. Plessy "belongs to the white or colored race." *Id.*

Defining who is a member of the "Black" race is a divisive, problematic, and highly sensitive subject, inextricably woven into the history of slavery and segregation in the United States. In 2008, a U.S. District Court addressed this ambiguity, rejecting outright the use of race as a factor in damage calculations. The Court observed:

> Franz Boas, the great Columbia University Anthropologist, pointed out that "[e]very classification of mankind must be more or less artificial;" he exposed much of the false cant of "racial" homogeneity when he declared that "no racial group is genetically 'pure.'"... [T]he reality [is] that the diversity of human biology has little in common with socially constructed "racial" categories.

McMillan v. City of New York, 253 F.R.D. 247, 249-250 (E.D.N.Y. 2008).

The "ethnic" category of Hispanic and Latino fares no better. At least one court has found that the term "Hispanic" is itself *nothing more* than self-identification:

> [w]hether or not a person is an Hispanic is not a biological characteristic but a psychological characteristic as to how one identifies himself

> or herself. It is not simply whether one has some Spanish ancestry or whether one speaks Spanish as a first language . . . [I]f an Hispanic man married an admittedly non-Hispanic woman and they had children, the children would have to make a decision about whether they would identify themselves as Hispanic . . . [F]actors such as whether the children are living with the father, how they feel about themselves, and the neighborhood where they live would influence whether the children would identify themselves as Hispanic. A person's surname is not a definite indicator. Some last names of persons who may consider themselves Hispanic may not be or may not appear to be of Spanish derivation. Conversely, a woman of admittedly non-Hispanic descent may take her husband's Hispanic surname upon marriage. Suffice it to say that whether a person is Hispanic in the final analysis depends on whether that person considers himself or herself Hispanic.

United States v. Ortiz, 897 F. Supp. 199, 203 (E.D. Pa. 1995).

Moreover, there is little consistency in how people self-apply the Hispanic or Latino labels. According to an April 2012 study by the Pew Hispanic Center, only twenty-four percent (24%) percent of Hispanic adults self-identify by the terms "Hispanic" or "Lati-

no."[7] The study found that fifty one percent (51%) say they self-identify by their family's country or place of origin, and twenty one percent (21%) use the term "American" most often to refer to themselves. The study concluded that this "system of ethnic and racial labeling does not fit easily with Latino's own sense of identity."[8]

B. UT's and the Federal Government's Racial Identification Standards are Necessarily Vague and Arbitrary

A cursory review shows that UT's system of racial classification is extraordinarily simplistic. Applicants to UT are required to complete and submit a standardized "ApplyTexas" application. In question number 7 of the application, applicants are asked for a yes or no answer to the question, "Are you Hispanic or Latino? (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race)."[9] Applicants are asked to answer "yes" or "no" to this ethnicity question, and no other ethnic choices are offered.

Applicants are then directed to "select the racial category or categories with which you most closely

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[7] Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), available at http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/.

[8] *Id.*

[9] ApplyTexas, "Sample Application," available at https://www.applytexas.org/adappc/html/preview12/frs_1.html (visited Sept. 8, 2015).

identify," choosing one or more of "American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White." The accompanying instructions provide no additional guidance, but merely instruct the applicant to: "[p]rovide the information regarding your ethnic background and race. The information will be used for federal and/or state law reporting purposes and may be used by some institutions in admission or scholarship decisions."[10] The applicant's self-selected race is then referenced "at the front" of his or her admissions application file, where "reviewers aware of it throughout the evaluation." *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009).

UT's reliance on five broad racial categories and a single ethnic category to achieve "holistic diversity" is not narrowly tailored. Students must self-identify their race and ethnicity, but it remains unclear what makes one applicant a "Hispanic or Latino," an "American Indian or Alaska Native," an "Asian," "Black or African American," a "Native Hawaiian or Pacific Islander," or simply "White." UT does not specify whether an applicant must be a "full-blooded" member of his or her self-identified race or ethnic group, or whether 1/2, 1/4, 1/8, 1/16, or even 1/32 heritage is sufficient to be granted or denied the "plus" factor.

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[10] *See* ApplyTexas, "Instructions for Completing Your ApplyTexas Application, U.S. Freshman Admission Application," https://www.applytexas.org/adappc/html/fresh12_help.html (visited Sept. 8, 2015).

Question 7 from the ApplyTexas application largely mirrors the 1997 racial standards issued by the U.S. Office of Management and Budget ("OMB").[11] Unlike the University, the OMB standards provide cursory definitions of the racial categories that the standards employ.[12] While the OMB standards are not models of clarity, they do attempt to define races geographically, based on continent or country of origin.[13] This approach is problematic and fraught with imprecision. For instance, it is unclear how many generations a person's ancestors must have lived, worked, married, and raised families in the United States before his or her continent or country of origin becomes North America or the United States. Nor does the OMB specify whether individuals may decide for themselves how many generations are needed before their country or continent of origin changes.

Furthermore, the federal government has recognized that self-identification method of racial identity (which UT appears to rely on) only works when the categories are "acceptable and generally understood both by members and nonmembers of the groups to which they apply," while simultaneously acknowledging that many people feel that limited choices between black and white do not accurately

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[11] *See* Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/.

[12] *Id.*

[13] *Id.*

represent who they are.[14] The OMB "prefers that self-identification should be facilitated to the greatest extent possible," while recognizing that this may necessitate the use of additional categories beyond black, white, and latino, because "[r]esearch shows that ethnic groups evolve and may modify their preferred ethnic group names; individuals may represent their affiliation with groups differently depending on the situation and may alter their perceived ethnic membership over time." *Id.* If research shows people self-identify as black, latino, or Native American sometimes but not others "depending on the situation," then one situation "racially ambiguous" people might pick to identify with a minority group is when they are applying to the University of Texas.

Conversely, the OMB reports that some federal agencies prefer to use "visual observation" of physical features such as skin color to determine whether someone belongs in a racial or ethnic category or not, since "discrimination is based on the perception of an individual's race or Hispanic origin."[15] However, unlike self-identification, the other-identification method may lead to the opposite problem of under-

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[14] *See* Office of Management and Budget, "Standards for the Classification of Federal Data on Race and Ethnicity," (Aug. 28, 1995) (broad self-identification categories are disfavored by the arguments of "some persons, particularly those of mixed heritage, that they cannot accurately identify their race and ethnicity as they prefer in Federal data systems using the current categories. They say the government should not limit their choice of identification."), available at https://www.whitehouse.gov/omb/fedreg_race-ethnicity.

[15] *Id.*

inclusiveness. Namely, someone with heritage of one race but features resembling those of another race might be denied inclusion in that race for official government purposes, even if that person might self-identify different. Agencies that prefer visual observation for classifications of race also prefer the simple categories of black, white, and latino and oppose the use of more complex gradients, because finer-tuned categories do not stand out enough visually:

> ...proposed changes [to Census racial and ethnic categories] include the suggested "multiracial" category as well as identification of national origins and ethnicities (for example, "Arab" or "Cape Verdean"). These agencies say that if categories are more detailed and include nationality groups, or if there is a "multiracial" category (and especially if the multiple races have to be identified), it would be virtually impossible to give instructions for how to classify by visual observation.[16]

Finally, the OMB standards were developed to "promote uniformity and comparability for data on race and ethnicity" and to "provide consistent data on race and ethnicity throughout the Federal Government."[17] The OMB standards disavow their use for anything other than statistical compilation:

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[16] *Id.*

[17] Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/.

> Foremost consideration should be given to data aggregation by race and ethnicity that are useful for statistical analysis and program administration and assessment, bearing in mind that the standards are not intended to be used to establish eligibility for participation in any federal program.[18]

Thus, even if UT were relying on OMB, those racial standards were never intended to be used to dispense benefits.

All of this raises the question of how the process of racial categorization should work in order to satisfy constitutional strict scrutiny. Should determining someone's race or ethnicity be a matter of looking at them, or asking them? If the former, the University of Texas is more guaranteed of getting a class of diverse people who look like they may have suffered from discrimination based on their different shades of skin color. However, it is doubtful that variance in complexion is really the kind of diversity the University aims to achieve. If on the other hand self-identification is the method employed, the risk of unfairly advantaging people who appear as if they have never been discriminated against based on race or ethnicity (and may not have been) is much higher, so the perhaps truer aims of diverse perspectives are lost.

With its self-reporting method of racial classification, UT appears to rely primarily on "self-

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[18] *Id.*

identification" to determine a person's race or Hispanic/Non-Hispanic ethnicity, just as the US Census Bureau does.[19] While UT's approach has the benefit of avoiding the offensive and intrusive blood line inquiries of the *Plessy* era (or a similarly dehumanizing visual inspection), self-identification nonetheless results in a process that is arbitrary, imprecise, and inherently unequal.

In either case, the University of Texas' (and the federal government's) racial and ethnic categories are not narrowly drawn. UT makes little effort to define what it means by its use of the "Black or African American" category. The failure to do so further highlights the inequality that its use of race creates. If two applicants are of both European and African ancestry, but one applicant self-identifies as "Black" and the other applicant self-identifies as both "Black" and "White," do both applicants receive the same "plus" factor? If one applicant self-identifies as "Black" and the other, like Mr. Plessy, self-identifies as "White," should the latter applicant be denied the "plus" factor?

Similarly, UT makes no effort whatsoever to define the term "Asian," which just as commonly refers to the four billion human beings who inhabit the largest and most populous continent on Earth as it does to a single "race" of people. It lumps together the two most populous countries on the planet,

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[19] U.S. Census Bureau, "What is Race," http://www.census.gov/topics/population/race/about.html (visited Sept. 8, 2015) ("The Census Bureau collects racial data... based on self-identification.").

China and India, each of which has more than a billion people and a multitude of languages, cultures, and religions. It is unclear whether UT's use of the term "Asian" includes applicants who are or whose ancestors were of full or partial Near or Middle Eastern origin, including persons of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered "White."

UT only uses one broad "ethnic" category of Hispanic or Latino for awarding plus factors. This category fares no better. Obviously, this single ethnic category does not begin to recognize or encompass the tremendous diversity of cultures, languages, religions, and heritages of the human race. Also undefined is whether the terms "Hispanic" and "Latino" refer to persons of full or partial Spanish ancestry only, or also to persons of other European ancestry. For instance, many ethnic Germans, Italians, and Jews migrated to predominantly Spanish-speaking countries in Central and South America and the Caribbean before immigrating to the United States. It also is unclear whether the UT admissions application reference to South America "or other Spanish culture or origin" includes Portuguese-speaking Brazil.

Almost any governmentally approved use of "racial classifications" – crude, ambiguous social constructs that rely on the arbitrary self-identification of hundreds of millions of individual Americans – is sure to fail the "narrowly tailored" component of strict scrutiny. Ultimately, the only way to treat the

illegitimate concept of race is to absolutely prohibit its use as a basis for government decisions affecting individuals or groups of individuals. Conveniently, such a prohibition is precisely what the Constitution already requires.

C. Application of our Confused Racial Concepts Leads to Questionable Results

The result of the misguided history of race and our modern struggle with trying to define it usefully is confusion over what it means and when it should apply. Take the example of the "Native American" racial category, which UT uses to award an admissions plus factor. Discussing what makes someone "American Indian or Alaska Native," the Native Americans Rights Fund acknowledges that "[t]here exists no universally accepted rule for establishing a person's identity as an Indian."[20] This definitional problem was highlighted in the controversy over Senator Elizabeth Warren during her 2012 campaign for Senate. Based on "family lore" and "high cheek bones," Ms. Warren claimed, perhaps quite sincerely, that she was 1/32nd Cherokee and therefore a Native American and a minority.[21] In response, many people predictably expressed doubt

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[20] Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," available at http://www.narf.org/frequently-asked-questions/ (visited Sept. 9, 2015).

[21] Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News* (May 3, 2012), available at http://www.cbsnews.com/news/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/.

that classifying Senator Warren as a "Native American" based on a system of racial self-identification made sense, much less served a legitimate purpose.

Under existing affirmative action policy, an applicant who, like the Senator, identifies herself as an "American Indian" based on family lore and high cheekbones would gain a "plus" factor toward admission, but an identical applicant without the family lore or cheekbones (or who was unaware that one of her 32 great-great-great grandparents happened to be Cherokee) would not. Imagine a freshman class at UT comprised of 6,715 Elizabeth Warrens, all identical but for the race or ethnicity of a single great-great-great grandparent. *See Fisher v. Univ. of Texas*, 645 F. Supp. 2d at 590 (there were 6,715 students in UT's 2010 freshman class). How much additional "holistic diversity" would a college achieve by deciding to admit these hypothetical Elizabeth Warrens based at least in part on their self-identification with a particular race or ethnic group? Should UT have denied such individuals admission in favor of applicants who are 1/16th Native Hawaiian/Other Pacific Islander or 1/8th Hispanic? What "critical mass" of diversity would result?

Similarly, consider the case of Rachel Dolezal, the NAACP Spokane Chapter president who self-identified as "Black" despite apparently having only "White" heritage. If membership in a racial class is a matter of self-identification as some government literature indicates, then there is no reason why Rachel Dolezal should not be awarded the racial plus

factor.[22] Most thoughtful observers agree this is not an easy question, and it again raises the issue of whether one's race is a matter of self-identification or other-identification. When discussing Rachel Dolezal, it appears that race is at least *partly* a matter of self-identification:

> On one hand, "black" is a statement of identity. It describes a certain culture and a certain history, tied to the lives and experiences of enslaved Africans and their descendants. It's a fluid culture, with room for a huge variety of people, from whites, to blacks, to people of Latin American and Caribbean descent.... [23]

But it is also *partly* a matter of how others identify you:

> [I]f I were born with lighter skin and more European features, I might be able to escape the stigma of blackness. I would still have the cultural connection, but I wouldn't occupy the same place in the hierarchy. What's key is that you can't choose your position in the hi-

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[22] J. Freedom du Lac and Abby Ohlheiser, "Rachel Dolezal, ex-NAACP leader: 'Nothing about being white describes who I am,'" Washington Post (June 16, 2015), available at http://www.washingtonpost.com/news/morning-mix/wp/2015/06/16/rachel-dolezal-i-identify-as-black/.

[23] Jamelle Bouie, "Is Rachel Dolezal Black Just Because She Says She Is? Maybe," Slate (June 12 2015), available at http://www.slate.com/articles/news_and_politics/politics/2015/06/rachel_dolezal_claims_to_be_black_the_naacp_official_was_part_of_the_african.html.

> erarchy. The political designation of race is a function of power — or, put differently, you are whatever the dominant group says you are.[24]

Unfortunately, this standard is both imprecise and arbitrary. Answering the question of whether Rachel Dolezal would qualify as "black" under affirmative action policies (and if not, why not) further exposes the confusion that reliance on "self-identification" can produce. Is genuine racial self-identification sufficient, or is it merely a stand-in for some kind of honor system where every individual applies the *Plessy* standard to themselves? To answer either way begs the ultimate question: why are governments continuing to bless policies which perpetuate the official recognition of racial and ethnic categories?

D. The Fifth Circuit's Decision Proves That Racial Categorization Must End

Because "race" is used without any precision in law, and because UT has made no effort to find any precision, the Fifth Circuit is forced to employ deliberately woolly language to uphold UT's flawed program for the second time. UT's admissions program fails strict scrutiny because it relies on the crude, inherently ambiguous, and arbitrary racial and ethnic categories in pursuit of an undefined "critical mass" of diversity. This Court's opinion in *Fisher* established that even allegedly benign racial

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[24] *Id.*

discrimination is subject to exacting strict scrutiny. *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2421 (2013) ("*Fisher*") ("Strict scrutiny must not be strict in theory but feeble in fact."). The Fifth Circuit failed to apply this high standard.

The unintelligibility of UT's "critical mass" diversity target is only compounded by the ambiguity of UT's underlying policy of allowing applicants to self-select their race or Hispanic/Non-Hispanic ethnicity in order to gain a "plus" factor towards admission. The policy fails strict scrutiny because it is not "narrowly tailored." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) ("[R]acial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling government interests.").

Following the Supreme Court's ruling in *Fisher*, the Fifth Circuit was required to evaluate whether UT's racial admissions program survived strict scrutiny based on the existing record of this case. *Fisher*, 133 S. Ct. at 2421. Rather than undertake a rigorous analysis of the University's use of race and ethnicity to choose between applicants for admission, the Fifth Circuit merely excused UT's failure to satisfy *Fisher*. It credited UT's "critical mass" diversity target as satisfying the constitution – a target which was never defined, is largely undefinable, and therefore cannot be narrowly tailored to further a compelling governmental interest. *Fisher v. Univ. of Texas*, 758 F.3d 633, 654 (5th Cir. 2014) ("*Remand Opinion*"); *Id.*, Judge Garza dissent at 661.

UT's unknowable "critical mass" standard is only the tip of the iceberg. In upholding UT's policy, the Fifth Circuit found that UT – and presumably other colleges and universities in the Fifth Circuit – may use race and ethnicity not only in pursuit of an undefined "critical mass" of diversity, but also "in its search for holistic diversity." *Remand Opinion*, 758 F.3d at 659. Like "critical mass," this "holistic diversity," or "diversity within diversity" as Judge Garza referred to it in his dissent, was also undefined. *Remand Opinion*, Judge Garza dissent, 758 F.3d at 669. As Judge Garza wrote, these abstractions are "too imprecise to permit the requisite strict scrutiny analysis." *Id.* And as Appellant has demonstrated, they are too vague to ever be narrowly tailored. *See* Petition for Writ of Certiorari, No. 14-981, filed Feb. 10, 2015, at pp. 13; 18, 22-27. Having failed twice to justify the use of "race" by employing equally vague standards like "critical mass" and "holistic diversity," the Supreme Court should now reverse the Fifth Circuit's decision in no uncertain terms.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the Court reverse the Fifth Circuit decision.

Respectfully submitted,

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